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In the Supreme Court of the United States

CASE NO. 77-851

MANUEL LOUIS FERNANDEZ,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals, for the Fifth Circuit, entered in the above styled cause on August 4, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is reported at_____

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Is it a violation of Defendant's due process rights for the trial court to deny Defendant's Motion for the Divulgement of a Confidential Informant where no claim of privilege had been made by the United States Government, nor any representation made that disclosure of the confidential informant would endanger the Government's interest when the divulgement of same was essential for the interests of justice in that Defendant's Motion to Suppress was dependent upon information which could only be provided through the examination of the confidential informant?

2. Is it a violation of Defendant's due process rights for the trial court to refuse to allow the divulgement of the confidential informant when it was apparent from the record and the testimony of Defendant that the confidential informant had information which would tend to exculpate the Defendant?

3. Is it a violation of Defendant's due process rights, and rights under the Fourth Amendment of the United States Constitution to deny Defendant's Motion to Suppress Evidence seized?

STATEMENT OF THE FACTS

The first witness for the Defendant on the Motion to Suppress and Motion to Divulge Confidential Informant was the Defendant, MANUEL FERNANDEZ. The Defendant testified that he recalled the morning of May 9, 1976. (R 22) He testified that he left a certain residence at or about N.W. 198th Terrace in the morning, carrying his identification and a white plastic bag which said "Tapes" on it. That this plastic bag was from the store located in Key West, Florida. (R 23) Defendant next testified that he got into his car and headed into the direction of LeJeune Road which was 42nd Avenue, going toward the Palmetto Expressway. He at all times, was observing the speed limits and stop signs and ran no red lights. (TR 24)

Defendant next testified that as he got near the Palmetto Expressway and 14th Avenue, when he turned left to go north on the Expressway, three or four unidentified cars pulled rapidly around him in a semi-circle, a voice yelled "stop", he looked around and became frightened. (R 24-25)

In viewing the people that had accosted him, he thought he saw a revolver and tried to get away. (R 25) He testified that he attempted to escape from these individuals and while being chased by them, threw the package marked "Tapes" out of his car window as he was afraid for his life. He testified he believed that that package contained a quantity of money. (R 26)

On cross, the Government asked the Defendant to describe the package. Defendant's response was that it was not transparent and that it wasn't translucent. It was a white plastic, approximately 12 x 12, with money in it.

(R 27) Defendant testified that he threw it out of the vehicle window which was on his side, and threw the package out with his right hand. (R 27) Upon response to the Government's question as to whether or not he had communication with the driver or occupant of one of the cars that was chasing him, Defendant responded that there was no need for conversation, that a gun was pointed at him, and the gun spoke for itself. (R 27-28) Defendant also testified that at that time he had other monies on his person, packaged in a different way. (R 28)

On re-direct examination, Defendant testified that he had come into possession of this package at about 1:00 in the morning when a guy named Juanito and another guy named Pablo asked if the Defendant would take some money down to a friend of his in Key West, known as Julio Mazura. (R 28) He testified he went to sleep, woke up approximately 6:00 in the morning and left at 6:15 a.m. with the monies. (R 29)

On re-cross, the Government adduced that the Defendant had arrived at that residence on 198th Terrace, owned by Pablo Cairo, on or about the 8th day of May, at 4:30 p.m. (R 29) That there was also present on the premises besides Pablo and Juanito, an individual named Danny Guzewich. (R 31) The Government inquired as to the amount of other monies Defendant had in his presence on May 9th and he testified a sum of money in the vicinity of Eight and a Half Thousand ($8,500.00) Dollars. (R 33)

The re-cross of the Defendant was thereupon concluded and the court inquired as to whether or not Pablo and Juanito were under subpoena by the Defendant. Defendant's counsel responded they had been unable to reach Pablo, that his phone had been disconnected, and they had

not been able to locate him at his house. With regard to Juanito, they did not know his full identity and that it was suspected that Juanito was the confidential informant. (R 37-38) The Court then asked the Defendant whether or not he threw out the package containing his own funds. Defendant responded in the negative. (R 38) At which point, the counsel for Defendant asked permission to amplify the answer and Defendant testified that immediately after throwing the first package out of the car, he lost control of the vehicle, and the car flipped, turned over, and caused him to go to the hospital. (R 39) At which point, the defense rested on the Motion to Suppress and the Motion to Produce Confidential Informant. (R 39-40)

The Government called for it's first witness, Special Agent James Harris, of the Drug Enforcement Administration. (TR 40) The witness testified that on the 7th, 8th and 9th days of May, 1976, he was conducting a surveillance as part of a surveillance team in the general vicinity of the residence of one Pablo Cairo. (TR 41) The witness stated that he became involved in the surveillance of the Cairo residence on May 8th at approximately 11:00 p.m. Further, that on May 8th, a cooperating individual had occasion to be in residence, and was in and out of the residence on several occasions. (TR 41-42)

The witness stated that the Defendant arrived at the residence of Mr. Cairo sometime on the evening of May 8th, and remained at the residence until the early morning hours. The witness testified that he remained several hours after the cooperating individual inside the Cairo residence left same. (TR 43)

Mr. Harris further testified that the surveillance continued until 6:30 in the morning when the witness and other

officers followed the Defendant upon his exit from the residence. (TR 44) Mr. Harris stated that the cooperating individual within the residence had informed him that there was a quantity of cocaine present in the Cairo residence which had arrived there shortly after 12:30 a.m. (TR 45) The witness further stated that the confidential informant had stated that the Defendant and another man would be leaving the premises, with the cocaine and that they had customers waiting for them in a motel nearby and that they were going to deliver the cocaine to the customers. (TR 45-46)

At approximately 6:30 a.m., the witness observed the Defendant leave the premises. The witness and other agents had determined that they would follow Mr. Fernandez and cause him to be stopped and frisked as they believed he had in his possession a quantity of cocaine. (TR 50)

Mr. Harris testified that at approximately 6:30 a.m., when the Defendant exited the residence, he was unable to see if the Defendant was carrying anything because his visibility had been blocked. (TR 50) At that point in time the Defendant got into the previously described Jeep and pulled away. He stated that at the outset, the Jeep was parked facing West on 198th Terrace, directly in front of the subject residence, that the Defendant proceeded in that direction for half a block, and then southward for a short block, and then eastbound on 198th street to 42nd avenue and then southbound on 42nd Avenue to 167th Street, where the vehicle turned left to the access road to the Palmetto Expressway. At that time, there were three government vehicles in pursuit of the Defendant. As the Defendant's vehicle reached the Palmetto Expressway, Agent Harris instructed one of the agents to pull past Mr. Fernandez and to cut in front of him, for one agent to drive

along his side, and one to stay behind him in order to effect a stopping. Harris testified that he put a portable blue light on the roof of his car and activated it. (TR 51-52)

The witness then stated the Defendant slowed down and when the agents maneuvered around him, he then made an abrupt turn to the right hitting one agent's car on the left front fender, pushing past that car, and spun into a vacant lot and headed the wrong way on the access road back to 42nd Avenue. (TR 54)

The Defendant then proceeded northbound back on 42nd Avenue where at one point he was doing nearly 70 miles per hour. (TR 55) Agent Cairo, who is associated with the witness in the chase, collided with the Defendant while traveling northbound on 42nd Avenue at which point Defendant continued to drive in an erratic manner. Approximately in front of 17301 N.W. 42nd Avenue, the Defendant threw a white package, plastic bag, with white powder in it out of the car. (TR 55-56) Shortly thereafter, the Defendant's vehicle veered off the road and turned over several times. (TR 56-57) The witness kept his eye on the package that had been thrown out of the car, and instructed Agent Milford to retrieve the package which Agent Milford did within the vision of the witness. (TR 59-60) When the car overturned, additional currency was scattered on the ground and strewn around the wreck. (TR 61)

On cross examination, the witness testified that the investigation had been commenced because of the information provided by the confidential informant. He indicated that the information that was developed was in large, part also from their own investigation of the information given by the informant and the following leads provided by him. (TR 65) The confidential informant had not been used prior

to May 9th by the Drug Enforcement Administration. (TR 65-66) Although, the witness testified that he had been told by an Officer of the Miami Police Department that he had used this informant on previous occasions, and his information had been reliable leading to the arrest of other Defendants in drug related crimes. (TR 66)

The witness testified that during the period of surveillance, approximately eight agents were involved in the viewing of the Cairo home. The witness testified that he left the surveillance at approximately 4:00 a.m. on the morning of the 9th to call an Assistant United States Attorney indicating he would like to apply for a search warrant but no formal application was in fact made. (TR 68-69) When questioned as to his reason for not getting the search warrant, the witness testified:

> "We thought that we were not in a position at that point to get a Federal Judge at 4:00 in the morning, and that it was impractical under the circumstances and that we were going to keep the place under surveillance until we could obtain the search warrant or that the persons were going to take out the cocaine and leave, and we were going to stop and frisk for weapons and search the vehicles." (TR 69)

The cross examination then continued into areas where the information provided by the confidential informant was not reliable. The witness testified that he had been advised that the Defendant would be carrying a gun when in fact, he was unarmed. He was further informed that he had been advised that one Danny Guzewich would be accompanying Mr. Fernandez, when in fact, he did not do that. (TR 70-71) When the witness was specifically asked what his intention

was with regard to Mr. Fernandez, once he was in his vehicle, the witness stated:

> "We were going to stop and frisk him for a weapon. We were not going to search him personally for cocaine. We were going to conduct the search under what I would call the Carroll Doctrine.
>
> QUESTION: For what purpose?
>
> ANSWER: To locate the cocaine.
>
> QUESTION: Locate the cocaine or for the weapon?
>
> ANSWER: For the cocaine.
>
> QUESTION: So you were going to stop the vehicle and search it for cocaine without a warrant and this was your intent all along?
>
> MR. ALTER: I object to that line of questioning as being argumentative.
>
> THE COURT: Sustained." (TR 72)

The witness then admitted that the government vehicles that were following Mr. Fernandez were unmarked vehicles with unexceptional license plates. (TR 73-74) The witness further stated he had no intention of stopping the Defendant for any kind of traffic violation and he was only pulled over to allow the agents to search for the cocaine. (TR 74-75)

The Counsel for Defendant next asked the witness if there was any reason he or his agents did not follow a cadillac that had arrived at the residence and then left the residence after the alleged contraband had arrived. The Government objected to the question and the Court sustained the objection. Counsel for the Defendant requested the right to proffer the materiality, the Court denied the right of the proffer. (TR 77)

The Court then ruled that it had heard enough evidence to make its ruling with connection to the two pending motions. The Court indicated it didn't need argument on the motions stating that it had been provided with cases and the Court understood the positions. (TR 80) The Court, accordingly denied both the Motion to Divulge Confidential Informant and the Motion to Suppress the Evidence. (TR 87) Thereafter, a pre-plea agreement was entered into by the Defendant and the United States Attorney in which the Defendant would enter a plea of guilty to the charge to a maximum two year sentence, reserving at all times material, his right of appeal on questions of the divulgence of the confidential informant and the motion to suppress. (R 26-27) The Court, accepting the pre-plea agreement agreed to accept same and referred same for a pre-sentence investigation. (TR 101) On or about the 19th day of August 1976, Defendant was sentenced to a term of two years incarceration followed by a special parole term of three years. (R 36)

REASONS FOR GRANTING WRIT

-1-

IT IS A VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS FOR THE TRIAL COURT TO DENY DEFENDANT'S MOTION FOR THE DIVULGEMENT OF A CONFIDENTIAL INFORMANT WHERE NO CLAIM OF PRIVILEGE HAD BEEN MADE BY THE UNITED STATES GOVERNMENT, NOR ANY REPRESENTATION THAT DISCLOSURE OF THE CONFIDENTIAL INFORMANT WOULD ENDANGER THE GOVERNMENT'S INTEREST. DEFENDANT SUBMITS THAT THE DIVULGEMENT OF THE CONFIDENTIAL INFORMANT WAS ESSENTIAL FOR THE INTEREST OF JUSTICE IN THAT HIS MOTION TO SUPPRESS WAS DEPENDENT UPON INFORMATION WHICH COULD ONLY BE PROVIDED THROUGH THE EXAMINATION OF A CONFIDENTIAL INFORMANT.

In the case instanter, the Defendant by Motion, sought the identity of the Government's confidential informant. Testimony was adduced at the hearing on the Motion to Suppress and prior thereto by Motion of Defendant's counsel to the effect that the Defendant believed that the Government's confidential informant had, in fact, procured the illegal act the Defendant was accused of. Although Defendant did not rely on a strict defense of entrapment; i.e. an admission of doing the guilty act, it was the Defendant's position that he had been provided the contraband by

the undercover informant under the guise that it was cash funds to be delivered to a third party in Key West, Florida. The identity therefore, of the confidential informant became essential to the Defendant's position in regard to his Motion to Suppress the evidence, and further, to defend himself and avail himself under his Sixth Amendment rights of confrontation at time of trial. It is a general rule that the Government is privileged to withhold from disclosure the identity of persons who furnish information relating to violations of law to officers charged with enforcing those laws. *Jencks v. United States*, 353 U.S. 657, 1 L Ed 2d 1103, 77 S. Ct. 1007 (1957). See also *Portomene v. United States*, 221 F.2d 582 (5th Cir. Fla. 1955). It is equally true that there is no exact rule with respect to the disclosure of the identity of an informer, and the requirement which is created is a balancing of public policy as opposed to a Defendant's right to properly prepare his defense. Most importantly, it has been held that whether a proper balance renders non-disclosure erroneous depends upon the circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. *Roviaro v. United States*, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S. Ct. 623 (1957).

In recognizing this balancing test, the most important consideration arises from what is felt to be the fundamental requirements of fairness. In other words, if an informer's identity is relevant and would be helpful to the defense of an accused or would be construed to be essential to a fair determination of the cause, the privilege of non-disclosure must give way. *Portomene v. United States, supra; Cannon v. United States*, 158 F.2d 952 (5th Cir. text 1946).

Perhaps the leading case dealing with the question of disclosure of the identity of a confidential informant is *Roviaro v. United States, supra.* In that case the United States Supreme Court ruled that the District Court, by allowing the Government to withhold disclosure of the identity of it's informer, committed reversible error where the informer, an undercover Government employee, had taken a material part in bringing about the Defendant's possession of the heroin, which was the basis of an indictment charging the Defendant with a violation of the narcotic drugs import and export act.

It was the position of the Defendant in the case at bar that the undercover informer, known only by the name "Juanito" (R 28) had provided him with the contraband under the misapprehension that the bag which in fact contained contraband, contained only currency.

Further, in *Roviaro*, it was indicated that the disclosure of the confidential informant would be proper in the event that he might be a material witness as to whether or not the Defendant knowingly transported the drugs as charged, although *Roviaro* differs from our case in that the undercover informant was the only participant other than the Defendant.

The Court specifically said (353 U.S. 60):

> "The scope of the privilege is limited by it's underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privilege. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations, the trial court may require disclosure and, if the Government withholds the information, dismiss the action."

The Court then went on to specifically say:

> *"Most of the Federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases, the Government has been required to disclose the identity of the informant, unless there was sufficient evidence apart from his confidential communication."* (Emphasis ours)

In the case at bar, the specific requirement of *Roviaro* with regard to this question is evident. In the instant case, the privilege has been upheld where the legality of a search without a warrant was in issue, and further, that the communications of the informer were claimed to establish the probable cause. This becomes more significant in light of the testimony of Government's witness, Harris, on cross-examination when he said that the investigation had commenced solely because of the information provided by the confidential informant. Further, that the information that was developed was in large, based upon the initial lead of the informant. (R 65) The reliability of the informant had

not been used by agents of the Drug Enforcement Administration prior to May 9 (TR 65-66) and the only basis upon which the informant's reliability had been established was that the witness had been told by an unnamed member of the Miami Police Department that he had used the informant on previous occasions and his information had been reliable. (TR 66)

The Count went on in *Roviaro*, in reversing and stating as follows:

> "Doe, (the undercover informant) had helped set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon the petitioner's identity or the identity of the package. He was the only witness who might have testified to the petitioner's possible lack of knowledge of the contents of the package that he transported from the tree to John Doe's car. The desirability of calling John Doe as a witness or at least interviewing him in preparation for trial was a matter for the accused rather than the Government to decide." (353 U.S. 64)

The facts are remarkably similar in the instant case. Although the Defendant testified that another individual by the name of Pablo Cairo had spoken to him about the delivery of the package, the Defendant and counsel, upon inquiry from the Court indicated that said Pablo Cairo had been impossible to contact, his phone had been disconnected, and they had been unable to locate him at his house (R 37-38) in effect, creating the confidential informant as the single witness to the occurrence.

Defendant's right to the divulgement of the confidential informant is further substantiated by the holding of the United States Supreme Court in *Sherman v. United States*, 356 U.S. 269, 2 L.Ed.2d 848, 78 S. Ct. 819 (1958) wherein the Court said that to determine whether the defense of entrapment has been established, a line must be drawn between the trap for an unwary innocent and the trap for the unwary criminal; to make this determination, the accused at trial should be allowed to examine the conduct of the Government agent or informant involved and avail himself of an appropriate and searching inquiry into the conduct of all parties, including himself, his predisposition, and how same relates to his claim of innocence.

The Government, by denying the Defendant the right of the identity of the informer, in effect, deprived the Defendant of either a viable determination on his Motion to Suppress or ultimately would have deprived him of a fair trial. As such, the decision of the trial court with regard to the question of the divulgence of the confidential informant should be reversed and remanded with instructions to divulge the identity as same would be consistent with the holding of the United States Supreme Court in the *Roviaro* decision.

IT IS A VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHTS FOR THE TRIAL COURT TO REFUSE TO ALLOW THE DIVULGEMENT OF THE CONFIDENTIAL INFORMANT WHEN IT WAS APPARENT FROM THE RECORD AND THE TESTIMONY OF DEFENDANT THAT THE CONFIDENTIAL INFORMANT HAD INFORMATION WHICH WOULD TEND TO EXCULPATE THE DEFENDANT.

The proffer to the Court, and the testimony of the Defendant, MANUEL LOUIS FERNANDEZ, indicated that the confidential informant had information which would tend to exculpate the Defendant from criminal responsibility in the charges against him. During the recross of the Defendant on the Motion to Suppress and the Motion for Divulgement of the Confidential Informant, Defendant's counsel responded to the Court's inquiry as to why Juanito was not under subpoena and indicated that the Defendant did not know the full identity of said Juanito and it suspected that the said Juanito was the confidential informant. (R 37-38) Further, in the Motion to Divulge the Confidential Informant, it was indicated to the Court that both Juanito, the suspected confidential informant, and Pablo Cairo had handed the package to the Defendant telling him same was money to be delivered to Julio Mazura in Key West, Florida.

The United States Supreme Court stated in the landmark decision of *Brady v. Maryland*, 83 S. Ct. 1194 (1963) the following:

> "We hold now that the suppression by the prosecution of evidence favorable to the accused upon request, violates due process where evidence is material to either guilt or punishment irrespective of the good faith or bad faith of the prosecution."

The essence of the *Brady* decision was to guarantee to the Defendant a fair trial. It was held by the United States Supreme Court that society wins not only when the guilty are convicted, but when criminal trials are fair. And, it was specifically held in the *Brady* case that criminal trials cannot be fair, if the Government knowingly withholds evidence favorable to a Defendant which could be used to the Defendant's advantage in defense of a criminal prosecution. In the case instanter, the Defendant had alleged certain facts which indicated that the confidential informant had certain information known to the Government which would tend to exculpate him. This evidence could not be proved, or provided by the Defendant in the absence of the Government divulging the identity of the confidential informant. The Court, though realizing same, still denied Defendant the right to the identity of this confidential informant.

Apparently, the Court tended to feel that the evidence may not have been material or material enough to require the Government to disclose the identity of the undercover individual. However, a growing number of courts have recognized that suppressed evidence's materiality and the requirement therefore may be satisfied even though such evidence would do no more than effect the credibility of a witness whose testimony prejudiced the Defendant's case. *Powell v. Wyman*, 287 F.2d 275 (5th Cir. 1961) and by implication in *United States v. McFarland*, 371 F.2d 701 (2nd Cir. 1966).

The Second Circuit Court of appeals expressly recognized the materiality of exculpatory evidence for the purpose of impeachment. In *United States v. Consolidated Laundry Corp.*, 291 F.2d 563 (2nd Cir. 1961) wherein it held that although it was impossible to know whether the result of the trial would have been different, no one could tell what might have happened if the Government's principal witness could have been effectively examined. See also *Giglio v. United States*, 92 S. Ct. 763 (1973). In the case instanter, it is clear that the manner and method by which the Defendant came into possession of the contraband is one which would be crucial to any defense on the question of possession. Certainly, if the Defendant has proffered that the confidential informant had knowledge that would exculpate him from this responsibility, same should have been provided as per *Brady*.

Clearly, the Defendant could not have been in an effective position to prove his guilt or innocence absent the disclosure of the confidential informant and the ability to examine him towards his exculpatory testimony. The non-disclosure of the confidential informant clearly falls within the *Brady* rule. Denial of this Brady material is grounds for a reversal of this conviction, and the instruction to the trial court to require the disclosure of the identity of the confidential informant so that the exculpatory testimony may be adduced by the Defendant.

IT IS A VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS AND HIS RIGHTS UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION TO DENY DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED.

The Fourth Amendment to the United States Constitution indicates that persons have the right to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, said right shall not be violated and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. In the case instanter, an arrest was made in what defendant believes to be grounds constituting less than probable cause without a warrant. The defendant concedes that the existence of probable cause or reasonable grounds justifying an arrest without a warrant may be determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Draper v. United States*, 358 U.S. 307, 3 L.Ed. 2d 327, 79 S. Ct. 329 (1959).

As was held in *Kwong How v. United States*, 71 F.2d 71 (9th Cir. 1934) the determination depends upon the particular evidence and circumstances of each individual case.

Probable cause or reasonable grounds justifying an arrest without warrant, exists only where the facts and circumstances within the arresting officer's knowledge and of which he had reasonably trustworthy information are

sufficient in themselves to warrant a man of reasonable caution in the belief that a narcotics offense has been or is being committed. *Draper v. United States, supra.* See also *Hernandez v. United States*, 17 F. 2d 373 (9th Cir. Cal: 1927). It is equally established law that mere suspicion or conjecture is not sufficient to establish probable cause or reasonable grounds, nor is good faith on the part of the arresting officer. *Worthington v. United States*, 166 F.2d 557 (6th Cir. Mich. 1948). Probable cause for arrest depends on the particular facts known to the arresting officer before or at the time of the arrest. What develops after the arrest cannot be used in determining whether the arresting officer at the time of the arrest had probable cause. *Johnson v. United states*, 333 U.S. 10 (92 L. Ed 436, 68 S.Ct. 367, 1948).

In the case instanter, it was the position and is the position of the Defendant that the arrest occurred in this case without probable cause at the time the DEA agents in the unmarked cars stopped the Defendant, surrounded his vehicle, and caused a restraint upon his freedom. As such, the validity of the arrest without a warrant, where no probable cause existed at the time of the arrest, becomes of paramount importance, irrespective of the nature of the fruits of the search made incidental to the arrest. *United States v. Walker*, 246 F.2d 519 (7th Cir. Ill. 1957).

Defendant recognizes that there is a distinct difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest. In assessing, whether a DEA agent as in the instant case has probable cause within the meaning of the Fourth Amendment and reasonable grounds within the meaning of the applicable Statutes, evidence within the knowledge of the agent may be considered even though the evidence is not

legally competent evidence in a criminal trial. *Draper v. United States, supra.* Consequently, the agent's knowledge may be based on hearsay evidence. However, where the agent's knowledge is based upon reliance on an informer, a different set of circumstances are established. It has been held that information obtained from an informer, though pertinent, does not necessarily establish probable cause or reasonable grounds particularly where it comes from an anonymous source or is unverified. *Johnson v. United States, supra.*

Information furnished by a reliable informer has been held not to constitute probable cause where it is not shown that such information was itself not more than mere guesswork or speculation.

A case closely on point with the instant case, is *Beck v. Ohio*, 379 U.S. 89, 13 L.Ed 2d 142, 85 S. Ct. 223 (1964). In that case the Court said:

> "An arrest without a warrant bypasses the safeguards provided by an object predetermination of probable cause, and substitutes instead the far less reliable procedure of an after the event justification for the arrest or search, too likely too subtly influenced by the familiar shortcomings of hindsight judgment. Whether or not the requirements of reliability and, particularly, of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent from where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed. See also *Wong Sun v. United States*, 471, 9 L.Ed. 2d 441, 83 S. Ct. 407 (1961)."

In the case instanter a surveillance was maintained of the residence for a period in excess of seven (7) hours after the allegedly reliable confidential informant had tipped the agents to the alleged presence of contraband in the premises. During this period of time, there was ample opportunity for the DEA agents to obtain a search warrant, and their failure to do so, was predicated only upon the statement of agent Harris, that it was impractical to awaken a Federal Judge to get a warrant.

The Court, in reversing the lower court's finding in the *Beck* case, said the following:

> "It is possible that an informer did in fact relate information to the police officer in this case, which constituted probable cause for the petitioner's arrest. But when the constitutional validity of that arrest was challenged, it was incumbent upon the prosecution to show with considerably more specificity than was shown in this case, what the informer had actually said, and why the officer thought the information was credible. . ."

In the case instanter there are no facts on the record to show why anything was considered credible, and further, that many of the things that had been indicated by the informer, did not come to pass, such as the second individual following the first individual and that all individuals concerned would be armed.

It is clear that if a Defendant has been unconstitutionally arrested or detained, or evidence obtained as a result of an arrest or detention, it is not admissable. *Beck v. Ohio, supra.* Any physical evidence seized at or after the

time of arrest, the validity of the seized evidence without warrant will depend solely on the viability of the arrest. *Sibron v. New York*, 392 U.S. 40 (1968).

In particular situation, as in the case instanter, where a Defendant is approached or accosted, and where an incidental object is thrown away, an illegal search accrues if the Defendant had been illegally arrested or detained prior to the time of the alleged drop. *Williams v. United States*, 237 F.2d 789 (D.C. Cir. 1956).

The United States Supreme Court dealt specifically with this question in *Rios v. United States*, 364 U.S. 253 (1960). In that case, the Court said in response to the Defendant's argument that there had been an illegal detention without probable cause as follows:

> "If therefore, the arrest accrued when the officers approached the doors of the taxicab, then nothing that happened could justify the search as its incident . . . the validity of a search thus turns upon the question of when the arrest occurred. . ."

In the case instanter, it is clear that the arrest occurred when the freedom of movement of the Defendant was stifled by the agents cutting him off and attempting to restrain his freedom of movement. Therefore, consistent with the Supreme Court's recognition in *Preston v. United States*, 376 U.S. 364 (1964), searches of an automobile had to meet the test of reasonableness of the Fourth Amendment, and evidence obtained as a result of such searches were admissable only in those instances. See *Schimmel v. California*, 395 U.S. 752 (1969).

Where the police, as in the instant case, cause a situation whereby evidence is brought into plain view where in advance, that might have been obtained by a warrant, these actions are not acceptable and the evidence should have been suppressed by the trial court.

CONCLUSION

Based upon the cases, authorities and policy cited herein, the Defendant respectfully urges this Court to reverse the judgment and sentence of the trial court and remand this cause to the trial court for appropriate disposition.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was furnished by mail to the United States Attorney, 300 Ainsley Building, Miami, FL this _____ day of _____, 1977.

ALVIN E. ENTIN, ESQ.